

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers. M 47494 (ND) and M 47495.

Set aside and remanded.

1. Navigable Waters -- Public Lands: Generally -- Surveys of Public Lands: Generally

An island within the public domain in a navigable stream and actually in existence at the time of the admission to the Union of the state within which it is situated remains the property of the United States.

2. Accretion -- Public Lands: Generally -- Navigable Waters

Once an island in a navigable stream which is public land washes away totally and then after statehood a new island forms in the same place, title to the new land is in the state.

3. Accretion -- Oil and Gas Leases: Lands Subject to -- Rules of Practice: Appeals: Generally -- Rules of Practice: Evidence

Where an oil and gas lease offer is rejected based on the conclusion that the land sought evolved from the bed of the Yellowstone River subsequent to North Dakota-Montana statehood in 1889 and, therefore, is state land, and, on appeal, the offeror contends that the land is public land and submits evidence which tends to show the existence of islands in the river prior to statehood that the offeror asserts persisted and, through accretion, merged with the river bank, the decision rejecting the offer may be set aside and the case remanded for consideration of the new evidence.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

David A. Provinse has appealed from the January 4, 1983, decision of the Montana State Office, Bureau of Land Management (BLM), which rejected noncompetitive over-the-counter oil and gas lease offers M 47494 (ND) and M 47495. 1/

The lands described in the two offers to lease for oil and gas consist of one tract which is divided by the Montana-North Dakota state line. Accordingly, two separate offers to lease were filed, each of which covered that portion of the tract located within the respective states. The lands presently are located on a large bend in the Yellowstone River but at one time consisted of an island or islands in the river channel, accretion to which eventually closed the river channel on the west side of the islands. The entire tract is now firm land located on the left bank of the river. 2/

The BLM decision rejected the offers to lease for oil and gas in their entirety because BLM had determined that the lands had evolved from the bed of the Yellowstone River subsequent to North Dakota-Montana Statehood, which occurred in 1889, and therefore the lands are owned by the States of North Dakota and Montana.

The Branch of Cadastral Survey memorandum dated December 20, 1982, which is referred to in the January 4, 1983, decision that rejected the offers, states as follows:

The Corps of Engineers' map titled, "Yellowstone River from Diamond Island to the Mouth of the River," Sheet No. 6A, report dated March 12, 1884, shows an island covered with timber in the approximate position of the firm land as shown on the aerial photograph AZK-6HH-136, dated September 1967. The plat of the survey by Lyman in 1910 indicated a sandbar in the same position.

The General Description in the field notes of the 1910 survey, prepared by Lyman, states, "The island crossed by the state

1/ Offer M 47494 (ND) describes 138.898 acres of

"lands along the left bank of the Yellowstone River accreted to fractional sections 5 and 8 of Township 23 North, Range 60 East, M.P.M. [sic], Richland County, Montana, but located East of the Montana-North Dakota boundary in sections 30 and 31 of Township 150 North, Range 104 West, 5th P.M. McKenzie County, North Dakota."

Offer M 47495 describes 278.349 acres "of unsurveyed lands on the left bank of the Yellowstone River accreted to portions of Sections 5, 6 and 8 in Township 23 North, Range 60 East, P.M.M., Richland County, Montana."

2/ The lands sought to be leased by noncompetitive lease offers M 47494 (ND) and M 47495 were previously included in noncompetitive over-the-counter lease offers M 42829 (ND) and M 43530 filed by Provinse. The previous offers were rejected, and an appeal was filed as to M 42829 (ND) by Provinse. That appeal was dismissed by this Board on May 13, 1980, because no statement of reasons was filed, as required by the regulation, 43 CFR 4.412. The present offers were filed on June 23, 1980.

boundary is a high sandbar, overgrown with willows at the north end."

In our opinion, the island indicated on the 1884 river chart was washed away and the sandbar indicated by Lyman in 1910 evolved from the bed of the river to a state of firm land.

In this review, we confirm our earlier opinions by memorandums of July 31, 1978 and March 28, 1979." 3/

The July 31, 1978, memorandum from the Chief, Branch of Cadastral Surveys to the Chief, Minerals Adjudication Section, refers to a 1938 photograph, not included with the record, which allegedly reveals a definite channel between the left bank of the Yellowstone River, as meandered by Lyman in 1910, and a substantial amount of the area claimed by Provinse as accretion land. The memorandum refers to the survey plat approved January 10, 1912, which shows a sand bar in the same location as the land in question. The memorandum concluded that the sand bar indicated by Lyman in 1910 evolved to a state of firm land supporting brush and trees as depicted on the 1938 photograph and that between 1938 and 1967 the channel gradually closed off and the land mass originally formed as an island attached to the mainland. Provinse correctly points out that this memorandum made no mention of the Corps of Engineers' map which was discussed in the December 20, 1982, memorandum.

Provinse contends that BLM's determination is wrong because BLM failed to consider all information in relevant survey field notes and available on other maps of the area from which it can be concluded that certain islands did exist in the area at the time of statehood; that the islands persisted until through accretion they became joined with the mainland; and that as such the land sought to be leased is public land of the United States available for oil and gas leasing. 4/

3/ The memoranda dated Mar. 28, 1979, and July 31, 1978, were the basis for rejection of the previously filed lease offers, M 42829 (ND) and M 43530. The memorandum dated July 31, 1978, states that the opinion of the Branch of Cadastral Survey was based on certain aerial photographs and on the official plats of survey of T. 23 N., R. 60 E., Principal meridian, Montana, approved Jan. 10, 1912; T. 24 N., R. 60 E., Principal meridian, Montana, approved Dec. 4, 1902; and T. 150 N., R. 104 W., fifth principal meridian, North Dakota, approved Dec. 8, 1902. The Mar. 28, 1979, memorandum described a sketch which outlined in various colors the lands available or unavailable for oil and gas leasing and the limits of offers M 42829 (ND) and M 43530.

4/ In the statement of reasons, Provinse refers to a map which he alleges to be in the possession of the Western Heritage Center in Billings, Montana. Provinse states that the legend on the map shows it was compiled from "official records of the General Land Office and other sources under the direction of Harry King, C.E., Chief of the Drafting Division of the General Land Office in 1897." Provinse states that this map shows "the channel of the Yellowstone River divided and an island in the river in the area involved in this appeal." Provinse included no copy of the map, citing a lack of copying facilities and the size of the map.

With his statement of reasons for appeal, Provinse submitted numerous exhibits. Exhibit C is a copy of Book 5955 of field notes made in 1910 when Lyman conducted a survey of the subdivision lines and meanders in T. 23 N., R. 60 E., Principal meridian, Montana. Exhibit D is a copy of portions of Book 5956 of field notes made in 1910 by Lyman during a retracement and resurvey of the east boundary of Montana through a part of T. 23 N., R. 60 E., Principal meridian, Montana. Exhibit E is a copy of the official plat of survey of T. 23 N., R. 60 E. Provinse states that the official plat shows the existence of two channels of the Yellowstone River which are separated by what appears to be a large sand bar. It is Provinse's position, however, that the official plat does not conform to the information shown in the field notes. Referring to the exhibits, Provinse states:

In the General Description of the lands surveyed, which appears on the last page of both Book 5955 and Book 5956 of Field Notes, the land mass crossed by the state line is described as an island covered with willow at the south end and sloping to a low sand bar at the north end. In Book 5956 of Field Notes [Exhibit D], which is a resurvey of the state line, pages 19 and 20 detail the survey line between mile posts 190 and 193. These notes show that in running the line north from mile post 190, the surveyor encountered the right bank of the Yellowstone River at 75.01 chains. His next call was 84.48 chains to a sand bar on the left bank of the main channel and he continued over a low sand bar to 125.75 chains where he entered dense undergrowth of willow on a high sand bar; thence thru scattered willow undergrowth to the left bank of the main channel of the river at 152.50 chains. Again the surveyor crossed the main channel of the river to the right bank at 182.85 chains and over a low sand bar to 197.85 chains where he established a monument for the meander corner of section 5. These survey calls clearly indicate that the Yellowstone River in this area was divided into two channels and that the landform crossed by the state line was associated with the left bank of the main channel. The meander calls of the right bank of the Yellowstone River downstream in Section 5 of Township 23 North, Range 60 East P.M.M. further establish the existence of firm land in the Yellowstone River which divided the two channels. These meander calls appear at page 22 of Field Notes 5955 (EXHIBIT "C") and commence on the Montana-North Dakota boundary at the meander corner of section 5. At the end of the first two calls of this survey line, the surveyor uses as a reference point the end of an island in the river. A computation based on the information in these calls shows that the end of the island which is used as a reference point lies over 1,000 feet to the west of the Montana-North Dakota boundary and over 3,000 feet north of the point where the survey line of the state boundary, detailed above, leaves the left bank of the main channel at 152.50 chains to return to the right bank of the river. This island would lay to the north and west of the sand island which was crossed by the state boundary line and would be the dividing land between the two channels of the Yellowstone River. This island was omitted from the official plat of survey

(EXHIBIT "E") which only shows a sand bar along the Montana-North Dakota line.

(Statement of Reasons at 2-3). Provinse asserts that where there are discrepancies between field notes and a plat of survey, the field notes control.

Provinse identifies exhibit F as a copy of a Corps of Engineers' map titled "Yellowstone River from Diamond Island to the mouth of the river, Sheet No. 6A, dated March 12, 1884." Provinse claims that this is a copy of the map referred to by the Branch of Cadastral Survey memorandum of December 20, 1982. The map shows two islands in the river in approximately the same position as the sand bar indicated by the plat of survey approved in 1912. Provinse states that exhibit F establishes the existence of islands in the area of interest prior to statehood and shows extensive soundings of the river depth which indicate that in 1884 the main channel of the river was on the west side of the islands. As exhibit G, Provinse submits a copy of a map identified as sheet No. 9, which was one of 12 maps detailing the course of the Yellowstone River that were the end result of a 1910 Corps of Engineers' survey of the river from Glendive, Montana, to its mouth. Provinse states that exhibit G covers the area involved in this appeal, that it gives detailed soundings of the depth of the river channels, and that it shows both islands and sand bars located in the river. Provinse further states:

EXHIBIT "G" shows an island crossed by the state boundary line which clearly fits the description of the island or sand bar mentioned by Lyman in the surveys * * * and also shows a larger island lying north and west of the island crossed by the state boundary. This larger island appears to be the island which Lyman uses as a reference in his survey of the meanders of the right bank downstream in Section 5. Attached to EXHIBIT "G" is a tissue overlay on which has been drafted the meanders of the right bank of the Yellowstone River in Section 5 which appear in Book 5955 of Field Notes (EXHIBIT "C" at page 26). Also drafted on the tissue are the reference calls indicating the location of the island in the Yellowstone River. These two reference calls intersect on the north end of the large island shown by the Corps of Engineers on EXHIBIT "G". This large island shown on EXHIBIT "G" is in the same location as the islands that appear on the 1884 Corps of Engineers map (EXHIBIT "F") and appear to be the same land mass.

(Statement of Reasons at 3).

Included with the statement of reasons as exhibit J is a copy of the report dated December 30, 1910, covering the Corps of Engineers' survey of the Yellowstone River from Glendive to the mouth of the river. Provinse states that the report was prepared in response to an Act of Congress of March 3, 1909, which requested a determination of the cost of improvements of the river and that the report emphasizes the fact that the Corps of Engineers since 1879 had been in charge of maintaining the navigability of the river. Provinse concludes that maps and charts prepared by the Corps

of Engineers should be the most accurate source of information concerning the river during the period in question.

In essence, one of Provinse's claim is that an island existed in the Yellowstone River at the time of the 1910 survey which was not reflected on the official plat of survey approved in 1912, but the existence of which was nonetheless ascertainable from the 1910 field notes and the 1910 Corps of Engineers' survey of the Yellowstone River, and that the island was one of the two islands reflected in the 1884 Corps of Engineers' map. Provinse's conclusion is that the islands which appeared on the 1884 map persisted until, through accretion, they merged with the west bank of the Yellowstone River.

[1] An island within the public domain in a navigable stream and actually in existence at the time of the admission to the Union of the state within which it is situated remains the property of the United States. Texas v. Louisiana, 410 U.S. 702, 713, rehearing denied, 411 U.S. 988 (1973); Scott v. Lattig, 227 U.S. 229, 242-44 (1913); Northern Pacific Railway Co., 62 I.D. 401, 403 (1955).

[2] Conversely, if an island in a navigable stream, which is public land, washes away totally prior to statehood and then after statehood a new island forms, even though it is in the same place, title to the new land which forms is in the state. Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir.), rehearing denied, 191 F.2d 705 (5th Cir. 1951), cert. denied, 342 U.S. 920 (1952). ^{5/} Although as a general rule the island owner owns accretion to the island, there are limitations on that rule depending on how far the accretions run and whether the accretions are deposited on a streambed owned by one other than the island owner. Houston v. United States Gypsum Co., 569 F.2d 880, 883 (5th Cir.), rehearing denied, 580 F.2d 815, 818 (5th Cir. 1978).

Provinse contends that the facts at issue come within the purview of Joseph Tomalino, 42 IBLA 117 (1979), where this Board held that an error in omitting to survey an island in a navigable stream does not divest the United States of title or interpose any obstacle to surveying it at a later time. The decision cites Moss v. Ramey, 239 U.S. 538 (1916), and Scott v. Lattig, supra, as authority. In Tomalino, the field notes of a public land survey conducted in 1883 recited the presence of a "sand island" in the area in dispute. In support of its assertion that the "sand island" was firm land at the time of the survey, the Government introduced an 1878 topographic survey of the Yellowstone River made by the Corps of Engineers which was undertaken to ascertain the navigability of the river, and which showed islands or other land forms in the area in question. As noted by Provinse, this Board referred to the 1878 Corps of Engineers' survey and stated in the decision

^{5/} The only exception would be where the island is submerged for a period of time and then reemerges through a subsidence of the water such that the same land is exposed. In such a situation, title remains in the original owner. Arkansas v. Tennessee, 246 U.S. 158 (1918); Widdicombe v. Rosemiller, 118 F. 295, 300 (C.C. W.D. Mo. 1902); Ralph F. Rosenbaum, 66 IBLA 374, 384, 89 I.D. 415, 420 (1982).

"the depiction of islands or other landforms in the river necessarily had to be reasonably precise or [the Corps'] work would have been meaningless." Joseph Tomalino, *supra* at 120.

In that case, however, other evidence introduced at a hearing included samples of trees and testimony establishing that the trees were of a variety that grew only in relatively dry land and that the trees were of an age such that they would have been growing on the island prior to statehood of the state in which the island was located. Evidence was also offered of a Federal grazing lease covering the disputed lands. This Board concluded therein that "[a]lthough there was no positive direct evidence of the physical condition of the island [at the time of statehood], inferences can be drawn from evidence in the record that the island was fast land at that time." Joseph Tomalino, *supra* at 121.

[3] It is clear from the December 20, 1982, memorandum from the Chief, Branch of Cadastral Survey, that the determination as to the continuance of a land form in the river was made with reference only to the "island crossed by the state boundary" which was located in the "approximate position of the firm land as shown on the aerial photograph AZK-6HH-136, dated September 1967." Provinse has presented evidence, however, of the existence of another island also located in the approximate position of the firm land sought for leasing. Provinse has further presented evidence that tends to show that the other island was in existence both in 1884 and in 1910. Likewise, Provinse has pointed out that both books of field notes for the 1910 surveys describe the land form crossed by the state line as an island covered with willow at the south end and sloping to a low sand bar at the north end.

The information submitted by Provinse on appeal tends to establish that the islands depicted on the 1884 map were, in fact, in existence at the time Montana and North Dakota were admitted to the Union (1889). BLM's conclusion that the lands in question were not leasable because those lands evolved from the river bed subsequent to statehood, and, therefore, are owned by the respective States, was based entirely on the December 20, 1982, Branch of Cadastral Survey memorandum. That memorandum states only that it is "our opinion" that the "island indicated on the 1884 river chart washed away." The record lacks evidence to support this conclusion. Although that memorandum states that it confirms the earlier memoranda of July 31, 1978, and March 28, 1979, we note that neither of those memoranda provide any support for the expressed "opinion."

We believe that the proper course of action in this case is to set aside the BLM decision and remand the case files to allow BLM to evaluate the evidence submitted by Provinse. The Board has stated that it is not the function of the Board to adjudicate offers on the basis of evidence submitted for the first time on appeal, and that it is appropriate to remand an offer for further consideration where new evidence is presented indicating that the offeror may be entitled to favorable action on his offer. Edward C. Shepardson, 53 IBLA 79, 87 (1981); Jean Oakason, 27 IBLA 41, 44 (1976).

If BLM again determines to reject the offers based on the conclusion that the land in question is state land, the record should include all evidence upon which that determination is based, including an analysis of all the points raised by Provinse in this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside and the case files are remanded to BLM for further action consistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge

